UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

No. 1:05-cv-11803-MLW

SHENIA DANCY-STEWART, as Administratrix of the Estate of Eveline Barros-Cepeda, Maria DaRosa and Luis Carvalho,
Plaintiff

vs.

THOMAS TAYLOR, JR., et al,
Defendants

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For Hearing Before:
Chief Judge Mark L. Wolf

Summary Judgment

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Monday, September 22, 2008

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P R O C E E D I N G S

(Lobby, 2:45 p.m.)

THE CLERK: Civil Action 05-11803, Shenia Dancy Stewart, et al versus Thomas Taylor, et al. The Court is in session. You may be seated.

THE COURT: Good afternoon. Would counsel please identify themselves for the Court and for the record.

MS. LITSAS: Good afternoon, your Honor. My name is Hellen Litsas. I represent the defendants, Thomas Taylor and City of Boston.

MR. OUELLETTE: Your Honor, Evan Ouellette, also, for the defendants, Thomas Taylor and City of Boston.

MR. STOCKWELL-ALPERT: Andrew Stockwell-Alpert for the plaintiff, Shenia Dancy-Stewart, your Honor.

MR. KEEFE: Your Honor, also for the plaintiff, William Keefe, your Honor.

THE COURT: Good afternoon. We're here today for the argument, and I hope the decision, on the pending motions for summary judgment. As I understand it from the record, at this point the plaintiff does not oppose the City's motion for summary judgment on Count V, the sole remaining count against the City that the plaintiff calls "The survival action." Is that

correct?

MR. STOCKWELL-ALPERT: Correct.

THE COURT: Well, I've reviewed that. I find it's meritorious. There's no evidence of an unconstitutional policy or practice. So the City's motion for summary judgment is hereby allowed.

Then before we get to Mr. Taylor's motion for summary judgment, he has a motion to strike parts of the plaintiff's Rule 56.1 statement. Some of the plaintiff's disputes -- some of the matters that the plaintiff asserts are in dispute are not supported by admissible evidence, what they do is dispute the phrasing of a particular point in the defendant's statement of alleged undisputed facts. For example, I particularly focused on Number 70 concerning whether Mr. Taylor saw any passengers? There's no evidence placing in dispute the fact that he saw no passengers or indeed the driver, but he did use the same exact words that the defendant uses in the Rule 56.1 statement.

It's my inclination not to strike the statement, but rather to disregard the contentions in it to the extent they're not supported by admissible evidence. This is an approach that many of my colleagues have taken in cases like ***Change the Climate***, 202 Frd 43 at 57, ***Preferred Mutual***, 53 F. Supp. 2nd 139 at 145, and

Degan, 2006 Westlaw 300425 at 7.

But do the parties want to be heard on that approach?

MS. LITSAS: That's fine, your Honor.

MR. STOCKWELL-ALPERT: That's fine, your Honor. I think, if I understand correctly -- for example, one of the things you kept taking exception to was use of the word "fleeing vehicle." Is that an example of what you're referring to?

THE COURT: I'd have to go step by step.

MR. STOCKWELL-ALPERT: Okay. Well, that's fine, your Honor.

THE COURT: So that's fine. And so that motion is denied. And the plaintiff's request for sanctions under Rule 11 is also denied. But if the plaintiff wanted sanctions under Rule 11, it had an obligation to serve the motion and give 21 days to cure before the motion was filed under Rule 11(c)(2). That wasn't done. In addition, I find that the motion to strike was not filed in bad faith or frivolous, it addresses some meaningful issues, so the request for cost or sanctions is also denied.

All right. Now we'll get to the main event.

(Pause.)

THE COURT: It's defendant Taylor's motion for

summary judgment. I'm familiar with the pleadings and, I think, the record. My tentative view is that based on what I perceive to be the undisputed facts, Mr. Taylor is entitled to summary judgment on the Fourth Amendment claim, which is the only Federal claim. Among other things, I don't think the evidence places generally in dispute that he was making a split-second decision and that he didn't see any passengers in the back and therefore had no intention to stop a passenger who turned out to be Miss Barros-Cepeda. So at the moment, I don't see a way to distinguish this case between -- distinguish this case from ***Landol-Rivera*** where the First Circuit held there was no Fourth Amendment violation.

Although we're on the fourth version of the complaint, I considered, so far, whether there might nevertheless be a violation of the Fourteenth Amendment right to substantive due process, which can exist even when there's not a seizure. That was discussed in ***Landol-Rivera***. But based on ***Landol-Rivera***, and particularly the higher standard than the First Circuit used in ***Landol-Rivera*** prescribed by ***The City of Sacramento vs. Lewis***, my present sense is that even if I allowed an amendment, it would be futile because on the undisputed facts Mr. Taylor didn't intend to cause harm for some illegitimate purpose. Again, he was acting

with only a split second to act and he did have a vehicle, which he perceived and the evidence indicates did hit his partner. So at the moment, I don't see that it would be appropriate to allow an amendment. And, in fact, a substantive due process claim wasn't made, perhaps deliberately, and it's not even in the case.

That would leave, if that analysis holds, the state law claims, which I probably would dismiss without prejudice to being brought in the state court. The state law provides a year to do that if the plaintiff thought it was worthwhile.

I guess I didn't mention that, in my tentative view, if somehow I were wrong and there is a constitutional violation that could be found, Mr. Taylor would be entitled to qualified immunity because this is so close to ***Landol-Rivera*** that a reasonable police officer would not know that what Mr. Taylor did based on undisputed evidence violated the decedent's constitutional rights.

So those are my tentative -- informed, but not final views, certainly. Since I'm leaning against the plaintiff, perhaps I ought to let the plaintiffs go first to see if you can alter my sense of the proper legal framework or point me to some evidence in the record that might put some material fact in dispute.

Would you like to do that, Mr. Stockwell-Alpert?

MR. STOCKWELL-ALPERT: I certainly have no idea what it would take to try to alter your thinking on this, Judge. I'm actually rather taken aback because I thought we distinguished this case very significantly and appropriately on the facts, even the facts that were in dispute here -- the undisputed facts, rather. I think that we have a situation, if I understand the holding of the central case that we're talking about, it begins with the premise that if an officer is acting reasonably under the circumstance, but I think I'm --

THE COURT: Well, actually, that isn't where I think the analysis begins either in ***Landol-Rivera*** or in cases that have clarified this since. the Fourth Amendment prohibits unreasonable searches or seizures. So the first issue that has to be addressed is whether there was a seizure. And it's that ***Brower*** case that was decided shortly before ***Landol-Rivera*** that prompted the First Circuit to find there was no seizure. So, actually, on my current analysis, it's not necessary to determine whether the undisputed facts make the conduct objectively reasonable.

MR. STOCKWELL-ALPERT: Well, does your Honor believe that right from the get-go, with regard to the seizure, that there was no seizure under the law?

Because I think, if that's the case --

THE COURT: Yes.

MR. STOCKWELL-ALPERT: I think that the fact that an officer says that he was shooting at the driver, to kill the driver, okay, isn't the controlling factor in determining what the conduct actually was or what the conduct turned out to be. I think this case is very distinguishable from the other because I think we have a situation here where an officer -- and, again, if you look at the totality of all of the facts surrounding the circumstances here, which is why even with the undisputed facts, I think we get over the hurdle. We have a police car following a vehicle at a reasonable rate of speed, a vehicle, which on its face, is not engaging in any criminal conduct as far as the officer who opens fire on it is concerned --

THE COURT: I thought that the evidence was that the two officers thought that the vehicle was failing to stop for another police car that was following it with its lights on?

MR. STOCKWELL-ALPERT: Well, they didn't have evidence to that effect, Judge, in the pleadings and, in point of fact, is that the siren was not on at the time and so there was no long chase in effect. And even if, in fact, they saw that happen, on the undisputed facts,

we have a police car following this vehicle, again at a reasonable rate of speed, not exceeding the limit, for block after block after block. We have the vehicle turning the corner and before it turns the corner we have the officer, who is in a position to stop the vehicle, in the best position other than the officers behind him, take out his gun. At that particular point, Thomas Taylor had every opportunity to either take out his gun or not take out his gun, which was the first choice point along the way. He took out his gun because he saw Officer Paillant take out his gun.

Officer Paillant doesn't shoot at the vehicle. The police officers following the vehicle don't shoot at the vehicle. These are undisputed facts, by the way. The vehicle turns the corner and Thomas Taylor loses sight of his partner, and before making any determination at all, which would have taken a matter of a few seconds, even under all the undisputed facts of the case, would have been able to determine that his partner was safe and okay. And therefore, his shooting at the -- but instead, and this gets to the seizure, Judge, he says he was shooting at the driver. But --

THE COURT: Excuse me. Let me ask you a question.

MR. STOCKWELL-ALPERT. Sure.

THE COURT: I read this part of the testimony. I thought he said he didn't see either the driver or the passenger. Is there someplace that he -- now I assume that he inferred that somebody was driving the vehicle, but is there someplace he says that he was shooting at the driver?

MR. STOCKWELL-ALPERT: Is there someplace he says he was shooting at the driver?

THE COURT: Yes.

MR. STOCKWELL-ALPERT: No, not that I know of. He said he was trying to shoot the driver because it was his intention to kill the driver if he could.

THE COURT: He said that?

MR. STOCKWELL-ALPERT: Yes. In fact, at the deposition he responded and said he would have killed the driver if he had a chance to, and he was questioned about that as well.

THE COURT: Do you know where I'll find that?

MR. STOCKWELL-ALPERT: I do not, at the present point, your Honor. But if I may go on at least?

THE COURT: I would like you to.

MR. STOCKWELL-ALPERT: Okay. He empties five bullets into the vehicle.

THE COURT: I thought the ballistician said

four?

MR. STOCKWELL-ALPERT: Okay. Well, actually, one of them went right through the back and was found inside the vehicle itself and that's the one that went straight through the back. The point being, Judge, that the officer's testimony and undisputed facts are that this officer continued to shoot at this vehicle when the vehicle was beyond the point that he could see his partner, going straight down the road, at a line of sight really where all he had to do was put the gun down and take a look and he would have seen that the other officers were safe. The argument in this case, Judge, is that shooting bullets into a vehicle, without knowing who's in it, without really having any crime engagement by any of the people in the vehicle, without being apprised of any of the circumstances surrounding the safety of his partner and what's going on, and shooting at the vehicle, a total of four or five bullets without stopping, is certainly the sort of conduct that I think would rise to a level that should go to the jury with regard to whether it's considered to be a seizure and can't be decided on summary judgment.

THE COURT: Well, you see that ***Landol-Rivera*** says there has to be an intent to seize the person whose rights were allegedly violated, and there was, in that

case, the police knew that there was a hostage in the vehicle with the person they were pursuing and they shot at the vehicle, at the hostage. And applying the recent, at that time, Supreme Court precedent ***Brower,*** as I read it, Judge Coffin, writing for the First Circuit, said that doesn't constitute a seizure of the hostage because there wasn't an intention to stop the hostage. And therefore, in the absence of a seizure, it couldn't be a Fourth Amendment violation.

MR. STOCKWELL-ALPERT: But he's shooting at the vehicle and ***City of Memphis***, ***Fisher v. City of Memphis*** says that if an officer shoots at a vehicle, that basically it's intended to stop everybody's rights in the vehicle. There's a seizure of everyone in it.

THE COURT: And here it -- you know, I thought that was the best case for you. The trouble is that, of course, is a Sixth Circuit case, ***Landol-Rivera*** is a First Circuit case. We're in the First Circuit. I have to follow the law as the First Circuit defined it. And it actually seems like ***Fisher*** is something of an outlier, that most of the circuits seem to agree with the First Circuit. But even if they didn't, I don't have the discretion to follow the law as defined in the Sixth Circuit if it's different than the law in the First Circuit.

MR. STOCKWELL-ALPERT: And I'm trying to point out that it's the facts in this case that significantly and sufficiently distinguish it from the facts in the other case, where we have an officer shooting a series of bullets into a vehicle in rapid succession through the back, through the side, into the vehicle, after the vehicle has made a turn --

THE COURT: How is that materially different than ***Landol-Rivera***?

MR. STOCKWELL-ALPERT: Because if the vehicle has turned the corner and is going down the street and the officer is shooting through the back of the vehicle, he can no longer be planning that his intent is simply to shoot the driver. He's attempting to stop the vehicle indifferent to whoever is in it or how many people are in it and therefore it's a seizure of the vehicle and everyone in it. He's no longer shooting at the driver if his shot goes straight through the back and kills a passenger in the middle of the back.

THE COURT: But the evidence --

MR. STOCKWELL-ALPERT: And by the way, Judge, he said that he --

THE COURT: Well, hold on just a second. See I have to focus on the evidence.

(Pause.)

THE COURT: Paragraph 68B of the plaintiff -- of the defendant's Rule 56.1 statement says: "When Officer Taylor discharged his firearm, he could see the driver's side of the Wurie vehicle, and aimed his firearm in that direction because he was attempting to disable the driver, the driver, Brima Wurie." It cites -- oh, actually -- and it cites Taylor's testimony at Page 106 and it says: "He was shooting at the driver's side. He was asked, 'Were you trying to kill the driver?' He said, 'I was trying to disable the driver from driving the vehicle.'" The plaintiff's response to 68B says "Undisputed." So --

MR. STOCKWELL-ALPERT: The plaintiff has also put in undisputed facts, Judge, and I do believe that --

THE COURT: Okay.

MR. STOCKWELL-ALPERT: And let me just --

THE COURT: No, let me do this. I'm trying to test -- 68B says it's undisputed that: "When Officer Taylor discharged his firearm, he could see the driver's side of the Wurie vehicle, and aimed his firearm in that direction because he was attempting to disable the driver, Brima Wurie." All right. Now, I think you were beginning to say that there's some other evidence that I should look at?

MR. STOCKWELL-ALPERT: It's undisputed that --

THE COURT: Okay. Now you have to tell me where I find it.

MR. STOCKWELL-ALPERT: Okay. I'm at a loss because I can't thumb my way through the -- and we have put in our statement of undisputed facts that Officer Taylor -- and, by the way, what we said was Officer Taylor said that that's what he was doing. Okay. And that's one of those little corrections that we believe --

THE COURT: And this is where they may have had a meritorious --

MR. STOCKWELL-ALPERT: Right.

THE COURT: I have to decide this based on admissible evidence.

MR. STOCKWELL-ALPERT: Right.

THE COURT: If he said it, you've got to put in something that challenges the credibility of it, that makes it a credibility determination for the jury.

MR. STOCKWELL-ALPERT: He also said he stepped out into the street and he continued to walk up the street firing at the vehicle.

THE COURT: And you'll say I'll find this in your statement?

MR. STOCKWELL-ALPERT: Yes.

THE COURT: Well, then give me a minute and

I'll look at it.

MR. STOCKWELL-ALPERT: Yes.

THE COURT: And when you say you can't do it, that's because you can't see it?

MR. STOCKWELL-ALPERT: Yes, Judge, it would take me forever to try to do it. It's a vision issue.

THE COURT: I know. I just wanted the record to be clear on that.

MR. STOCKWELL-ALPERT: Right.

THE COURT: So I'll look for it. And Mr. Keefe can help you, too.

Do you have the papers here?

MR. KEEFE: I don't have the papers here, your Honor.

MR. STOCKWELL-ALPERT: No, Judge.

THE COURT: You didn't bring the papers?

MR. STOCKWELL-ALPERT: No, Judge. I didn't think that he'd be able to do this, so.

THE COURT: Well, all right. You're doing a nice job.

(Pause.)

THE COURT: All right. (Reads.) As I understand it, there's an objection to the admissibility of the testimony of Murphy, the ballistician who's -- who is Camper?

MR. STOCKWELL-ALPERT: Tyrone Camper is a ballistician. He's not -- but there is a --

THE COURT: No, Camper is a witness and Murphy is the ballistician.

MR. STOCKWELL-ALPERT: Right. Well, Murphy is our ballistician.

THE COURT: Right. And who's Tyrone Camper?

MS. LITSAS: If I may assist, your Honor? Tyrone Camper was an officer who went to the scene after the incident and collected the cartridges.

THE COURT: Thank you.

(Reads.)

THE COURT: Okay. So I'll consider the evidence in Plaintiff's J and K along with the evidence.

MR. STOCKWELL-ALPERT: Did you look at the eyewitness, Judge? There was also an eyewitness --

THE COURT: Can I finish?

MR. STOCKWELL-ALPERT: I'm sorry, Judge.

THE COURT: (Pause.) Okay. Go ahead.

MR. STOCKWELL-ALPERT: I don't know if your Honor found this, but there was also a civilian witness who gave deposition testimony, and I believe we cited that as well in our own undisputed facts, that indicated that he heard shots fired and he saw the officer follow a vehicle down the street. That the shots weren't even

fired until the vehicle turned the corner and went down the street. So there are conflicting versions, which are undisputed facts, in and of themselves, that tend to dispute Taylor's only recitation about when he shot. They would go to the central issue with regard to whether he was actually seizing the vehicle when the occupants were in it.

THE COURT: Well, then why did you write "undisputed" in response to 68B?

MR. STOCKWELL-ALPERT: Because my understanding of that fact, in the tightly-drawn fashion that it was written, was that Taylor says, in his deposition, that when he originally aided the vehicle, he was attempting to shoot at the driver. And I can't dispute what Taylor says in his deposition as that which he said. I can certainly dispute that that's what went on. And so what I tried to do is put in the facts that would dispute the fact that what he says he was doing was really going on.

THE COURT: Is there anything that you think would place in dispute his assertion that he didn't see any passengers?

MR. STOCKWELL-ALPERT: No. I also think that he didn't see the driver. I think the man just shot randomly at this vehicle for some period of time,

including when it went around the corner, and shot through the back of it. And that's why I'm saying, it's like in the probable cause standard, Judge, the fact that the officer says that this was what his intention was is not the standard, it's not the standard to judge whether or not there was a seizure in the vehicle because Taylor says he had all the best intentions in the world and was shooting originally to try the shoot the driver, who he didn't see any better than the passengers. And a vehicle that nobody else shot at, by the way, even though they were much closer and had a better view of it.

THE COURT: Do you understand that, on my reading, and I think it's repeated a number of times, for there to be a seizure, the First Circuit says there has to be an intention to seize, to essentially to stop the passenger who turned out to be Miss Barros-Cepeda?

MR. STOCKWELL-ALPERT: I think that that's based on the facts of that case because if that were the general rule to govern all cases, then any time -- I mean, here we have a situation where there was nobody in the vehicle doing anything wrong at the time, particularly, warranting the vehicle being shot at and essentially the entire vehicle was being shot at by the officer. And he's saying that he intended to, you know,

shoot the driver, but he didn't see the driver any better than the passenger. So it doesn't matter what he says about who he was intending to do what with, he was shooting at this vehicle, and therefore he intended it -- under the circumstances, whatever he intended, he seized the vehicle and the occupants in it all equally. And that's why I'm saying, you know, factually, this case is totally distinguishable. It's a unique set of facts in which an officer fired at a vehicle.

And because of that, I don't think that that particular holding, which I think is narrow and limited to the facts in that case applies. There's no hostage passenger here. There's no -- I mean, basically he's shooting at nobody to try to stop the vehicle. He says he tried to shoot at the driver. And that's why I think it takes it out of the First Circuit's narrow reasoning with regard to that and I think it puts it more on the Sixth Circuit reasoning.

THE COURT: Well, no, but there's another Sixth Circuit case, it's ***Claybrook,*** and in ***Claybrook***, the person who was in the vehicle couldn't be seen and the Sixth Circuit dealt with it different than it did ***Fisher.*** It said, "Well, if you can't see a person in the car, you can't intend to seize that person." So even if we're in the Sixth Circuit --

MR. STOCKWELL-ALPERT: So the defendant seizes no one, because he couldn't see the driver? So it doesn't matter. He's just shooting at this vehicle.

THE COURT: And then it gets analyzed under Federal law as a possible Fourteenth Amendment substantive due process violation. But whether it's logical or not -- and Oliver Wendell Holmes tells us "The life of law is not logic, it's experience," there's a higher standard, I believe, for Fourteenth Amendment purposes because there's an intent requirement. When you're dealing with a split second -- well, you didn't allege a substantive due process claim.

MR. STOCKWELL-ALPERT: No, I think we'd never get there, Judge. I don't think we would ever meet the Fourteenth Amendment standard, quite frankly.

THE COURT: Well, thank you for your candor because I -- look, there's somebody dead here and I don't want to make a mistake and, you know, if you failed to plead something because you didn't understand you could, I wanted to make sure your client wasn't prejudiced. But you're right. You're right. I mean, I've analyzed the evidence as if you've pled it, and when split-second decision-making is involved, the Supreme Court in that ***City of Sacramento vs. Lewis*** case says, you know, you really need a purpose to inflict

harm that's independent of some legitimate purpose. So you're right. You're right.

MR. STOCKWELL-ALPERT: Judge, I just -- we keep coming back to the split second and I, quite frankly, take exception to the split second. It was only a split second because the officer made it a split second. The whole point of this entire case was there never was a need for him to discharge his firearm at this vehicle. And, I mean, to be quite frank, Judge, if an officer, under these circumstances, can hide behind a First Circuit case in saying, "Well, I was shooting at nobody and therefore the shooting is okay because even if I kill somebody, it doesn't matter," then basically what we're saying, Judge, is a civilian with a gun, a license to carry a gun, if they see a vehicle hit a pedestrian, that they should have a right to shoot the driver because the life of the pedestrian was in danger.

THE COURT: Well, that's -- look, that's not an apt analogy.

MR. STOCKWELL-ALPERT: Okay, let's put it back to the officer. Okay? Obviously an officer may be deemed to have a different or a higher standard. But, Judge, the officer's partner can't be exalted beyond that level of any pedestrian or anybody in the street who the officer loses sight of momentarily that might be

hit by a vehicle. And even assuming that this guy was hit by a vehicle, that doesn't give the officer an automatic right to discharge five bullets in a continuous stream -- including that the vehicle is down the street, okay, in order to stop that vehicle, and then come back and say, "I was trying to kill the driver because the life of my partner was in danger," when the vehicle following the officer on the street, who was actually and supposedly struck by that vehicle, not in that shoot and both of them had the perfect opportunity. In fact, the one behind the vehicle could have shot.

And in their depositions, by the way, they say, "You're not supposed to shoot at a vehicle." The officer on the street then draws his gun. He has every opportunity to shoot right into the vehicle. He doesn't shoot. But this guy is across the street, doesn't see a thing, loses sight of his partner, and he shoots. He can't classify that as a split-second decision, and if it was, then that's an unreasonable and wrong split-second decision and it resulted in a seizure that I believe passes muster.

THE COURT: Well, it's split second, I think. Whether his conduct was objectively reasonable might be debatable, but if there's no seizure, it might not be

debatable. Assume, without finding, that it's debatable, if there's no seizure, there's no Fourth Amendment violation.

MR. STOCKWELL-ALPERT: Well, that's true, it does begin with a seizure, Judge. And I understand that it's a tough case, okay, to get behind, to get by, but I do think, under these circumstances, that the particular conduct in the particular shooting in the particular fashion in the particular vehicle, with nobody in the vehicle being seen and a steady stream of bullets being fired at this vehicle with nobody being seen, down the street, through the back, okay, as it's continuing to go, at a point where it could be clear that, you know, the person who he's trying to protect -- and also, Judge, given the fact that anything he did, okay, under those circumstances, could have killed any one of a number of people on the street or in the vehicle or in the police car that was following, um, it clearly is a seizure.

THE COURT: Well, let me ask you this. Officer Taylor also asserts that he has qualified immunity, that if he's liable -- I mean, if the Fourth Amendment was violated, a reasonable police officer in his position wouldn't know that, in part, because of ***Landol-Rivera***, but since ***Landol-Rivera***, at least

immediately, it seemed to me, is to control this situation, why wouldn't he have qualified immunity?

MR. STOCKWELL-ALPERT: Several reasonable police officers at the scene, two of them were following this vehicle all the way through for blocks and blocks and followed him around the corner didn't shoot because they knew that they shouldn't. The officer who was struck, to some extent, by the vehicle, pulled his gun and didn't shoot. There were the reasonable police officers at the scene who didn't shoot. So I would say right then and there that we have examples of what a reasonable police officer, standing in the position of this officer, would do under the circumstances, they wouldn't shoot a vehicle that hit a pedestrian or hit another police officer.

THE COURT: But the question is would a reasonable police officer, an objective test, know that shooting, in those circumstances, would constitute a seizure of a passenger who might be hit and therefore potentially at least a violation of the Fourth Amendment in view of the First Circuit law, which is consistent with many other circuits, in ***Landol-Rivera***?

MR. STOCKWELL-ALPERT: I can't imagine how an officer, shooting at a vehicle that's clearly moving down the street, obviously in a purposeful fashion,

obviously being driven by somebody who can't be seen, and then being occupied by a bunch of other people, all whom he doesn't know, none of whom are doing anything unlawful, okay, wouldn't have reason to know that it's unreasonable to shoot at that vehicle, under those circumstances, and that it would be violating the law. And by the way, Judge, he stepped -- and this is also in the facts, okay, in either our statement of the facts or their statement of the facts. He stepped off the sidewalk into the street, planted his feet, said a prayer, aimed the gun, and shot at the vehicle. That's not split second. That's deliberative thought process.

THE COURT: He said a prayer?

MR. STOCKWELL-ALPERT: Yes. He said, "I hope to God I hit the driver," or whatever, words to that effect. Off the street, left a pedestrian whom he had been interviewing with regards to a crime -- off the street, into the street, turned around, and shot down Fayston Street after saying a prayer. I don't think that's split second.

THE COURT: I don't think -- well, are there any cases that would move this from sort of the ***City of Sacramento*** standard to the ***Whitley v. Albers*** standard when there's really time to deliberate? Any case?

MR. STOCKWELL-ALPERT: None that I know of,

Judge. I mean, my point is if this man was aiming to stop the vehicle by shooting at the vehicle, the whole conduct wasn't just to kill the driver, it was to stop the vehicle, and if it was to kill the driver, it should have ended the moment it was very clear that that driver wasn't going to stop. If the vehicle is traveling down the street and away, that by his moving across the street, it's clear that he's not just shooting to stop the driver.

THE COURT: Well, let me ask you this. What are your two state law claims?

MR. STOCKWELL-ALPERT: We've got conscious pain and suffering, which is a very short period of time, assuming this woman may have been alive.

THE COURT: That's what you call your survival action?

MR. STOCKWELL-ALPERT: Yeah.

THE COURT: Based on what, an assault and battery?

MR. STOCKWELL-ALPERT: Um, well, it's a derivative claim, it basically for that period that she's alive, because what happens is --

THE COURT: I know, but there has to be some tort that would permit awarding damages.

MR. STOCKWELL-ALPERT: Wrongful death.

THE COURT: What?

MR. STOCKWELL-ALPERT: Their wrongful death claim, the state wrongful death claim. That conscious pain and suffering would be a separate cause of action for the time that she's alive because those damages go to a different group of people. So you break out the conscious pain and suffering from the wrongful death because her death may not have been immediate.

THE COURT: Okay. And what are the elements of the wrongful death claim? Because this wasn't dealt with much on --

MR. STOCKWELL-ALPERT: The wrongful death claim is simply -- it's a state law claim that says if a person who deliberately or negligently causes the death of another shall be liable for, and it spells out the various elements that they're liable for, the burial expenses, you know, and --

THE COURT: But basically the best theory for the plaintiff would be negligence.

MR. STOCKWELL-ALPERT: The best theory?

THE COURT: On the wrongful death. You don't have to prove intent, you're saying, that it would be sufficient to prove unreasonable conduct.

MR. STOCKWELL-ALPERT: Right, but I think under the circumstances, it's very clear that the

shooting is a deliberate act and so I think that we have every option to go both ways and let the jury sort it out, and we do have the officer in this. I think the problem with the negligent wrongful death is in the negligent wrongful death, I think the City would be --

THE COURT: The City would be liable.

MR. STOCKWELL-ALPERT: Right. And we have a claim where the officers shot into this vehicle and the shooting was a deliberate piece of conduct. And so therefore it falls within that prong.

THE COURT: Intentional.

MR. STOCKWELL-ALPERT: Right.

THE COURT: But I thought the -- let's see. I thought I just, with your agreement, granted summary judgment for the City because there's no evidence of --

MR. STOCKWELL-ALPERT: Well, that would be the problem with the negligence part of it, Judge, but that's why the prong that still exists would be deliberate. Wrongful death encompasses both.

THE COURT: But you don't have a wrongful death claim, at the moment, against the City?

MR. STOCKWELL-ALPERT: Well, the wrongful death claim, I believe, is bifurcated basically because it's deliberate or negligence and I think it got broken down separately. The City --

THE COURT: The only count against the City was Count 5. Well, let me see.

(Pause.)

MS. LITSAS: Your Honor, I believe the only count was Count 5, the survival action, and that was the subject of a motion to dismiss because you had previously ordered dismissal of all other claims under your prior ruling. In addition, your Honor, in that previous ruling you had also determined that there was no prior negligence claim by the plaintiff.

(Pause.)

THE COURT: All right. Miss Litsas, would you like to be heard?

MS. LITSAS: Very briefly, your Honor. We would just reiterate your conclusion with respect to ***Landol-Rivera***. Even by the plaintiff's own confessions in his opposition, it's the controlling case in this jurisdiction. And what is material and dispositive about the facts is whether or not the plaintiff can prove an intentional acquisition of control of the passenger, the decedent, Eveline Barros-Cepeda. ***Landol*** makes perfectly clear that shooting at the vehicle is not sufficient to demonstrate and overcome that hurdle. Here there is no evidence that Officer Taylor even knew of the passenger, Eveline Barros-Cepeda, nor any

evidence that he intended to seize her. And without that requisite evidence, there is no seizure claim.

And in addition, your Honor, just moving very quickly, even if you do not find a seizure, a lack of seizure, you can rule on qualified immunity very swiftly. There's no evidence on the clearly established -- and not even getting to the objectively reasonable component, just looking at the seizure component, as the Court has already determined. Seizure, the law would not clearly establish that Officer Taylor's conduct constituted an unlawful seizure at the time he was involved in the incident. In fact, the case law suggests that his actions were lawful, given the ***Landol*** ruling.

And then your Honor can also find qualified immunity again on the clearly-established component because the Supreme Court, in ***Rousseau,*** established, looking at all the other cases in similar situations where police officers were shooting at a moving vehicle, established that it was not -- clearly established that a shooting, in this type of scenario, was clearly established as unlawful.

So in three different ways, your Honor, you can grant summary judgment very swiftly. For the remainder, your Honor, we would rest on our briefs.

In terms of the couple of points that my opposing counsel made, there's no evidence in the record that Officer Taylor intended to, or stated in any way that he wanted to kill the driver. He only stated that his intent was to disable the driver and that is an undisputed fact.

There's no evidence, of course, in the record that he intended to seize the passenger. He didn't even know that there was a passenger in the vehicle.

And then opposing counsel also makes a point that there were no sirens in the vehicle, the police vehicle behind. The evidence suggests otherwise.

THE COURT: Well --

MS. LITSAS: It's not necessarily a material fact, but I just pointed it out for clarification.

For the remainder, your Honor, we will just rest on our briefs. And we would ask that the Court grant summary judgment for Officer Taylor.

THE COURT: Well, if I grant summary judgment on the Federal claims, I have to decide what to do with the two state court claims. Ordinarily I would just dismiss them without prejudice and if they were brought in the state court, they would be litigated there. Do you understand?

MS. LITSAS: Yes, that's correct, your Honor.

THE COURT: All right. I'm going to take a break and then I may be able to give you a decision.

(Short recess, 3:20 p.m.)

(Resumed, 3:45 p.m.)

MR. STOCKWELL-ALPERT: Your Honor, may I be heard briefly?

THE COURT: Yes.

MR. STOCKWELL-ALPERT: I did want to point out, as my colleagues wanted me to try to impress upon you, one last time, that if no set of different facts would change the situation and it's this Court's view that the First Circuit statement, or the First Circuit case says that the intention of the officer is what controls under all circumstances, no matter how dissimilar the facts are, then obviously we would lose. But it's hard for me to imagine that all cases that come down, of this type, where police shoot at vehicles, should be or are controlled by the blanket principle that it's the officer's intention at the time he shoots at the vehicle with regard to the person whose rights claim to be violated, that that's what basically controls no matter how dissimilar the facts are.

THE COURT: Well, as a general proposition -- here, you can be seated.

(Mr. Stockwell-Alpert is seated.)

THE COURT: As a general proposition, I agree, but on the evidence in this case, for reasons I'll describe in detail, Officer Taylor is entitled to summary judgment. There certainly could be a different case with different facts in which the officer would not be entitled to summary judgment. I have to decide this case based on the established law and the evidence that's presented.

The parties have been litigating this for a long time. They've all done a good job. When somebody is dead, which is the case here, there's a desire on the part of the Court to be particularly careful where there's generally a -- if there are material facts in dispute, not just a need, but a valuable service rendered when a jury decides a case. But if there are no material facts in dispute and the defendant is entitled to judgment as a matter of law, judgment must enter for the defendant as a matter of law, no matter how poignant the facts. This is such a case.

I'm going to explain my ruling orally in detail. The fact that it's being given to you orally should not suggest that it is all been -- at all that it's been reached casually, but we're here, we're immersed in this. The transcript will be one record of the decision. I'll review the transcript and make any

corrections if the Court Reporter misunderstands me. I may also take the transcript and convert it into a separate memorandum and order. I'll probably do that if this decision is appealed, so it would be easier to read, it would be in a more familiar format.

This case arises out of the shooting death of a woman, Eveline Barros-Cepeda, who was killed when the defendant, Thomas Taylor, a Boston police officer fired into the car in which she was a passenger in an attempt to stop the vehicle. The plaintiff's third amended complaint asserts six causes of action, all arising from the same facts.

A 42 United States Code, Section 1983 claim for wrongful death essentially against Officer Taylor. A Section 1983 so-called survival action against Officer Taylor, and that's Count 2. A Section 1983 municipal liability claim against the City of Boston, Count 3, which was previously dismissed. A Massachusetts General Law, Chapter 229, Section 2, wrongful death action against Officer Taylor. A survival action for pain and suffering against the City of Boston, Count 5, which, with the agreement of the plaintiff and because it was meritorious, summary judgment has already, earlier today, been granted to the City on. And a so-called survival action for pain and suffering against Officer

Taylor, Count 6. All of the plaintiff's Federal claims allege a violation of the decedent's Fourth Amendment right to be free from unreasonable seizures. The state law claims are brought under the pendant jurisdiction of the court. The plaintiff seeks compensatory and punitive damages, costs, interest and attorneys' fees.

The summary judgment standard is both familiar and important. The Court's discretion to grant summary judgment is governed by Federal Rule of Civil Procedure 56. Rule 56 provides, in pertinent part, that the Court may grant summary judgment only if the pleadings, the depositions, the answers to interrogatories, and the admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. That's Rule 56(c).

In addition, the facts are to be viewed in the light most favorable to the nonmoving party. When a party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial, there can no longer be a genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

In determining the merits of a motion for summary

judgment, the Court is compelled to undertake two inquiries. One, whether the factual disputes are genuine and, two, whether any fact genuinely in dispute is material. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit, under the governing law, will properly preclude the entry of summary judgment.

To determine if the dispute about a material fact is genuine, the Court must decide whether the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. This decision must be based on the admissible evidence, as the First Circuit explained in ***Feliciano vs. State of Rhode Island***, 160 F. 3rd 780 at 787, in 1998.

Unless otherwise noted, viewing the evidence in the light most favorable to the plaintiff, the following facts are not in dispute. The decedent, Eveline Barros-Cepeda, was a Cape Verdean woman living in Dorchester, Massachusetts. She was 25 years old at the time of the events at issue in this case. Plaintiff, Shenia Dancy Stewart, is the administratrix of the estate of Miss Barros-Cepeda by appointment in the Suffolk Probate and Family Court.

At the time of the events giving rise to this

claim, Officer Thomas Taylor, Jr., was a member of the Boston Police Department, sometimes referred to as the BPD. The defendant, City of Boston, is a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts and located in Suffolk County. The City is the public employer of the defendant, Officer Taylor. Witnesses Michael Paillant, Robert Connolly, and Debra Flaherty were also members of the Boston Police Department. Witness Brima Wurie was the driver of the car in which Miss Barros-Cepeda was traveling when she was shot. At the time of the incident, he was on parole and his driver's license had been suspended.

Shortly after midnight on the morning of September 8, 2002, Boston police officers Connolly and Flaherty were traveling in a marked police cruiser on Columbia Road in Dorchester, Massachusetts. While stopped at the intersection of Columbia Road and Hancock Street, the officers claim that they observed a white Taurus that failed to stop at a red traffic light. Plaintiff disputes this fact noting that the driver of the vehicle, Wurie, testified that the traffic light indicated that he could make a lawful left turn. The officers then attempted to stop Mr. Wurie's vehicle. The parties agree that the officers activated their

cruiser's flashing lights, but Wurie claims that he never heard a siren or any other noise from the cruiser.

There is considerable dispute about the nature of the pursuit that followed, however this dispute is not material. The defendant characterizes Wurie's actions as a failure to heed police instruction and his actions, it is claimed, were an attempt to evade the police. The plaintiff objects to these characterizations of Wurie's actions, noting that Officers Flaherty and Connolly never used their cruiser's loud speakers to issue any verbal instructions and that Wurie's actions were not actually an attempt to evade the police. The plaintiff notes that the officers testified that Wurie never exceeded the speed limit as they followed him and that the only point at which Wurie went fast was when he turned from Dunkeld Street onto Fayston Street, the intersection where the shooting occurred. The plaintiff also notes that Officer Flaherty testified that it was not a long time, probably minutes, passed from the time that they first began to follow Wurie to the time that he turned onto Fayston Street. Officer Flaherty notified the Boston Police Department's Operations Department of their location in an attempt to apprehend Wurie's vehicle. These broadcasts were not heard by Officers Taylor and Paillant who were assigned to

another district and operating on a different radio channel.

The parties are in agreement on the reason why Wurie refused to stop for the police. While Wurie recognized that the Boston police were attempting to pull him over, he stopped -- he refused to stop his vehicle because his driver's license had been suspended, he was on parole, and he did not want to return to incarceration.

Throughout the events at issue, Wurie drove the vehicle in question. Carlos Fernandez was sitting in the front seat of the vehicle. The decedent, Eveline Barros-Cepeda, was sitting in the back seat of the Wurie vehicle along with Luis Carvalho and Maria DaRosa.

During the relevant period, Officers Taylor and Paillant were conducting an unrelated sexual assault investigation near 85 Fayston Street in Dorchester. At the time that the Wurie vehicle traveled onto Dunkeld Street, Officer Paillant was standing outside his marked police cruiser located on Dunkeld Street at its intersection with Fayston Street. Sitting inside the cruiser was the suspect in the alleged assault, James Nicholas. At the time, Officer Taylor was near 85 Fayston Street meeting with the alleged victim of the assault.

Officer Paillant immediately noticed the Wurie vehicle and the Boston Police Department cruiser with its lights flashing as they traveled on Dunkeld Street. Determining that the driver of the vehicle had committed the crime of refusing to stop for police, Officer Paillant stepped into the street in front of the Wurie vehicle. As Officer Paillant stood in the roadway, he directed Wurie to stop his vehicle using verbal and hand commands. Officer Paillant also pointed a gun at the car at this time. At the time that Officer Paillant was signaling to Wurie's vehicle from near the intersection of Dunkeld and Fayston Streets, the Wurie vehicle was located approximately halfway up Dunkeld Street. As the Wurie vehicle approached Officer Paillant, he began to move to his left, the vehicle's right, in an attempt to get out of the way of the car.

Officer Taylor asserts that the front right side of the Wurie vehicle struck Officer Paillant's body and that Officer Paillant moved onto the hood of the vehicle, ultimately falling off to the ground where he remained bent down for several seconds. This account is supported by the testimony of several witnesses. Officer Flaherty testified that: "The vehicle I was trying to stop, the white car, he hit Officer Paillant." Officer Connolly also testified that the

Wurie vehicle hit Officer Paillant. Officer Taylor stated that Paillant "got hit, slammed onto the front of the car, and gasped for air." Trevo Carter, a bystander, also testified that he saw the Wurie vehicle strike Officer Paillant. In addition, Officer Paillant himself testified that the Wurie vehicle struck him.

Officer Paillant further testified that his elbow and leg hit the hood of the Wurie vehicle and he rolled off. He testified that his elbow subsequently hit the fender and front door of the car. Finally, Officer Paillant testified that he was on the ground for a couple of seconds before he stood up.

The plaintiff asserts that Wurie did not hit Officer Paillant, but as Officer Paillant moved to the right of the vehicle, he slapped the hood of the vehicle with his hand and then crouched down on the ground for a couple of seconds. Wurie testified that: "All I remember is his gun, keep following me, and then he slapped the hood like 'Stop' and I kept going." Wurie also testified that he did not hit Officer Paillant.

While Officer Taylor walked back toward his cruiser, with the alleged assault victim from 85 Fayston Street, he noticed Officer Paillant look down Dunkeld Street and make a startled exclamation, "What the -- "

Officer Taylor moved into Fayston Street and

observed Officer Paillant step in front of the Wurie vehicle, yelling for it to stop, and putting his hands up. Officer Taylor then heard the car's engine "rev up" and saw Officer Paillant remove his firearm. At this point, Officer Taylor removed his own firearm and told the alleged victim he was with to wait on the sidewalk. Officer Taylor then saw the Wurie vehicle strike Officer Paillant on the front passenger side of the hood and strike him near the knees and Officer Paillant fall forward onto the car with his torso.

Taylor testified that from his view, when the Wurie vehicle struck Officer Paillant, the vehicle was turning onto Fayston Street and Officer Paillant's feet were kicking "as if he was met with a stronger force and he was trying to keep himself from being run over, and Taylor can see his hands on the hood and the car was turning."

Taylor asserts that at this point he lost sight of Officer Paillant and did not know if he would be run over or dragged by the Wurie vehicle. The plaintiff objects to this characterization of Officer Taylor's impressions noting that Officer Taylor did not use the words "run over" or "drag" in the deposition testimony cited as support. This, however, is a semantic dispute. It is not material. When I say a "semantic

dispute," I mean that the plaintiff has not introduced evidence to put the substance of Taylor's assertion in genuine dispute.

The defendant goes on to dispute that before firing, Officer Taylor noted that the suspect in the sexual assault matter was sitting in his cruiser and stepped into the street to minimize the possibility of hitting him.

The plaintiff disputes any characterization of Officer Taylor's actions that suggests a relatively long passage of time, noting that Officer Taylor testified that "everything happened very quickly." That's in plaintiff's 56.1 response at Paragraph 66.

Consistent with that position, the plaintiff also does not dispute the statement that: "Officer Taylor made the split-second decision to stop the Wurie vehicle by discharging his firearm because he believed that Officer Paillant's life was in danger and he believed that discharging his firearm was the only decision he had." That is asserted by the defendant in his Rule 56.1 statement in Paragraph 74. It refers accurately to Mr. Taylor's deposition, Defendant's Exhibit H at Page 109. In Plaintiff's 56.1 response at Paragraph 74, the plaintiff states that that assertion is undisputed.

The plaintiff also does not dispute the statement

that "Officer Taylor believed that as long as the Wurie vehicle continued to move, Officer Taylor was still in danger." That's Plaintiff's 56.1 response at 67.

At this point, Officer Taylor discharged his firearm. Neither party states how many shots Officer Taylor fired, although the testimony of the plaintiff's ballistician suggests that there were at least four shots. The ballistician being Mr. Murphy, whose testimony the defendant alleges is not admissible, but his testimony is not material to the outcome of the motion for summary judgment.

The plaintiff does not dispute the assertion that, quote: "When Officer Taylor discharged his firearm, he could see the driver's side of the Wurie vehicle and aimed his firearm in that direction because he was attempting to disable the driver, Brima Wurie," end quote. That is in defendant's 56.1 statement in Paragraph 68B. It is Exhibit H of the Taylor deposition at Page 106. The plaintiff acknowledges that this is undisputed in paragraph 68B of his 56.1 response.

Taylor asserts that when he discharged his firearm, he had not seen any passengers in the vehicle and was not aware of the presence of any passengers in the vehicle. That's in Paragraph 70 of his 56.1 statement. The plaintiff does not dispute the

underlying truth of this statement, but observes that Officer Taylor only testified that he did not see the driver or any passengers of the vehicle at any point.

The actual testimony is as follows: Question, "You had no idea. You hadn't seen any driver of the vehicle at any point, had you?" Answer, "No." Question, "You hadn't see any passengers in the vehicle at any point, had you?" "No, I did not." Question, "You didn't know how many people were in the vehicle, right?" Answer, "No." That's the Taylor deposition, Exhibit H at Pages 108 to 109.

There is no admissible evidence to place this in dispute, that is, there's no admissible evidence from which a jury could find that Officer Taylor had seen any passengers in the vehicle at any point.

Exhibits J and K, submitted by the plaintiff, excerpts of the testimony of Camper and Murphy, provide evidence sufficient for a jury to find that the defendant shot through the back of the vehicle at least once. And it's saying -- and I assume, for present purposes, without a finding, that Murphy's testimony is admissible. However, it remains undisputed that the defendant did not see any passenger in the vehicle. The jury could not reasonably find that the defendant intended to seize a passenger who turned out to be Miss

Barros-Cepeda.

The defendant asserts that when Officer Taylor regains sight of Officer Paillant and the vehicle slowed, Officer Taylor ceased discharging his firearm. The plaintiff does not dispute the substance of this statement, but notes: "More accurately, Taylor testified that at the moment he put down his gun, he saw Paillant getting off the ground."

Plaintiff suggests that Officer Taylor saw or should have been able to see Officer Paillant when he fired at the Wurie vehicle. The implication is that Officer Taylor should have known at the time that he fired that the Wurie vehicle no longer posed a threat to Officer Paillant. The plaintiff cites the deposition testimony of Trevo Carter who states that he didn't hear gunshots until after Officer Paillant had gotten off the ground and began running toward Officer Taylor.

In addition, the plaintiff submits the testimony of John Murphy, who, as I said, is a ballistician hired by the plaintiff, which suggests that Officer Taylor could have seen Officer Paillant when he fired the fourth and fatal shot at the Wurie vehicle. As I noted, Officer Taylor challenges the admissibility of Murphy's testimony noting that it's based on a graphic from the Boston Globe which he, quote, "assumed," end quote, was

correct. Officer Taylor asserts that this testimony relies on hearsay, the Boston Globe graphic, and is not admissible under ***Daubert,*** 509 U.S. 579, because Murphy was unaware of what data supported the Globe graphic and whether it was reliable. However, as I indicated earlier, this dispute is not material.

After shots were fired, Wurie continued to drive one block down Fayston Street, turning right on First Street and then exiting the vehicle. When Officers Flaherty and Connolly caught up to the vehicle, they found Miss Barros-Cepeda unconscious on the back seat and called for an ambulance. At the hospital, Miss Barros-Cepeda was pronounced dead of gunshot wounds from Officer Taylor's bullets.

In the opinion of Dr. Jennifer Lipman, the witness for the defendants, the gunshot wound did not cause immediate unconsciousness, but Miss Barros-Cepeda was likely conscious for less than a minute. Dr. Lipman also testified that Miss Barros-Cepeda experienced conscious pain and suffering during the time between when she was shot and when she died.

It is undisputed that after the incident a forensic examination of the Wurie vehicle revealed black markings on the hood and front side. After examinations of Officer Paillant's gun and holster, it was determined

that the black markings on the Wurie vehicle's hood and the control sample from the bottom of Officer Paillant's holster contained a black polymer consistent in all measured physical and microscopic properties and chemical composition. It was determined that they could have come from the same source.

In connection with the September 2002 incident, Brima Wurie pled guilty to several offenses including assault and battery with a dangerous weapon, operating a motor vehicle to endanger so that the lives or safety of the public might be in danger, leaving the scene after causing personal injury, accessory after the fact to assault by means of a dangerous weapon, and operating a motor vehicle without being licensed.

With regard to the analysis relating to those facts that are undisputed, the undisputed facts establish that no seizure of Barros-Cepeda occurred. Therefore, Officer Taylor's actions did not violate the Fourth Amendment. In essence, I find that this case is analogous on all material respects to ***Landol-Rivera vs. Cruz Cosme***, 906 F. 2nd 791, a 1990 First Circuit case, which applied the Supreme Court's decision in ***Brower vs. County of Inyo***, 489 U.S. 593, a 1989 decision, to facts comparable to the facts from this case.

As the First Circuit explained in ***Landol-Rivera***,

the Fourth Amendment protects against unreasonable searches and seizures. When an alleged violation of the Fourth Amendment is at issue, there is a two-part test to be employed. First, the court must decide if there was a seizure within the meaning of the Constitution. Second, if so, it must decide whether the seizure was objectively reasonable. And that two-part test emerges from the Supreme Court's decisions in ***Graham vs. Connor***, 490 U.S. 386, at 395 to 96, and ***Brower***, 489 U.S. at 595 to 600.

The question of whether there's been a seizure within the meaning of the Fourth Amendment is a threshold question. If answered in the negative, the use of force is not actionable under the Fourth Amendment no matter how reasonable, as explained in the Federal Judicial Center's 2008 edition of Section 1983 litigation at Page 47.

In ***Brower***, the Supreme Court held that unless the restraint of liberty resulted from an attempt to gain control of the individual who has brought the case, there has been no Fourth Amendment seizure. ***Landol-Rivera*** was a case brought by a hostage who the police knew was in an automobile when the police shot at it in an effort to stop a robber from fleeing with the hostage. The First Circuit wrote in ***Landol-Rivera***, at

Page 795, quote: "We reject the notion that the intention requirement is met by the deliberateness with which a given action is taken. A police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of a hostage that the Fourth Amendment was designed to govern," end quote.

Other circuits have agreed with this analysis, including the Sixth Circuit in ***Claybrook vs. Birchwell***, 199 F. 3rd 350, at 355 and 359, determining the plaintiff who was struck by an errant bullet during a police shootout with her father-in-law was not seized because the officers were aiming at her father-in-law and did not realize she was hiding in a parked car. Also consistent with the reasoning of the First Circuit in ***Landol-Rivera*** is ***Childress vs. City of Arapaho***, 210 F. 3rd 1154, at 1156 to 57, a 2000 Tenth Circuit case, finding, in a hostage-shooting case, no Fourth Amendment seizure because the officers intended to restrain the minivan and the fugitives, not the hostages. Also consistent with the First Circuit's reasoning is the Second Circuit's 1998 decision in ***Medeiros vs. O'Connell***, which held that where a hostage is struck by an errant bullet, the governing principle is that such

consequences cannot form the basis of a Fourth Amendment violation. As the First Circuit wrote in ***Landol-Rivera***: "It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim." That's at Page 796.

In this case, it is undisputed that Taylor did not know that there were passengers in the car when he made a split-second decision to shoot at it. That, as I said earlier, is found in Exhibit H, Taylor's deposition at pages 108 to 109, and the plaintiff's response to the defendants' Rule 56.1 statement in Paragraph 7.

This case is actually stronger for the defendant than ***Landol-Rivera*** in which the police knew that a hostage was in the vehicle. I note that in circumstances less analogous to ***Landol-Rivera*** than this case, other District Courts in the First Circuit have applied the arguably restrictive interpretation of what constitutes a seizure. I have particularly in mind ***Medeiros vs. Town of South Kingston***, 821 F. Supp. 823, a District of Rhode Island 1993 case, and ***Marrero vs. Toledo***, 968 F. Supp. 27, a 1997 District of Puerto Rico case.

In essence, I also find that no seizure occurred in this case, therefore there was no violation of the Fourth Amendment. In reaching this conclusion, I

recognize that in ***Fisher vs. City of Memphis***, 234 F. 3rd 312, at 318 to 19, the Sixth Circuit issued a decision that, to some extent, supports the plaintiff's position.

In ***Fisher***, the Sixth Circuit reasoned that: "By shooting at the driver of the moving car, the police officer intended to stop the car, effectively seizing everyone inside, including the plaintiff." However, the First Circuit decision in ***Landol-Rivera*** is to the contrary. It does not adopt the reasoning of the Sixth Circuit in ***Fisher***. It's axiomatic that sitting in the District of Massachusetts, part of the First Circuit, I must follow the law as it's been interpreted by the First Circuit. And because there was no seizure, it is not necessary to analyze whether the undisputed facts demonstrate that the force used by Officer Taylor was objectively reasonable.

As I said in the course of the argument today, the third amended complaint does not allege that Officer Taylor violated Miss Barros-Cepeda's Fourteenth Amendment right not to be deprived of life without due process. It does not assert a substantive due process claim. Miss Cepeda-Barros is -- well, the plaintiff's counsel stated today that that omission was not accidental, it was deliberate because he felt -- I would

now say recognized that a valid substantive due process claim could not be alleged and proven. ***Landol-Rivera*** did assume that when there was no seizure, an excessive use of force claim could properly be analyzed as a possible violation of the Fourteenth Amendment right to substantive due process.

Such a claim was discussed by the Supreme Court in County of ***Sacramento vs. Lewis***, 523 U.S. 833, in 1998, particularly at Page 845. Similarly, in ***County of Sacramento,*** the Supreme Court said: "A substantive due process analysis is therefore inappropriate in this case only if the respondent's claim is covered by the Fourth Amendment." Similarly, the First Circuit said, in ***Evans vs. Avery***, 100 F. 3rd 1033, at 1036: "Outside the context of a seizure, a person injured as a result of police misconduct may prosecute a substantive due process claim under Section 1983." As I also noted, this possibility was recognized in ***Landol-Rivera*** at Page 796.

If it appeared the plaintiff had a viable substantive due process claim, I would consider allowing a fourth amended complaint. Rule 15 does say that leave to amend should be freely given where justice so requires. However, such an amendment has not been requested and would not be appropriate in this case

because it would be futile. Cases like ***Foman vs. Davis***, 371 U.S. 178, at 182, and ***Palmer vs. Champion Mortgage***, 465 F. 3rd 24, at 30, a First Circuit case, make it clear that amendments should not be allowed if they would be futile. The undisputed facts of this case indicate that such an amendment, even if requested, would be futile as the plaintiff recognizes.

The plaintiff bears a heavy burden in attempting to make out an excessive force claim on the theory of a violation of substantive due process. The underlying question is whether the government conduct in question shocks the conscience, as the Supreme Court reiterated in ***County of Sacramento,*** at 846. In applying the "shocks the conscience" standard, the Court has established two parallel tracks for evaluating official action. In cases in which the defendant has time to deliberate and act, such as in most custodial situations, the standard is that of deliberate indifference. However, in cases where split-second decision-making is called for, such as in high-speed chases, police conduct will only be sufficiently conscience shocking if it is undertaken with a purpose to cause harm unrelated to the legitimate object of arrest.

This was explained by the Supreme Court in ***Lewis***

at Pages 853 to 854. The Supreme Court said there: "When unforeseen circumstances demand an officer's instant judgment, even precipitous recklessness fails to inch close enough to harmful purpose to spark the shock that implicates the large concerns of the governors and the governed. Just as a purpose to cause harm is needed for an Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case." That was a chase case, but a comparable split-second case. This is -- these standards were also discussed in the Federal Judicial Center's Section 1983 litigation volume at Pages 37 to 38 of the 2008 edition.

In this case, once again, the key facts are undisputed and make it impossible -- would make it impossible for a reasonable jury to find a violation of the plaintiff's right to substantive due process, even if one were alleged. The plaintiff, as I explained earlier, does not dispute that Officer Taylor believed that as long as the Wurie vehicle continued to move, Officer Paillant was still in danger. In addition, the plaintiff does not dispute the statement that Officer Taylor made, the split-second decision to stop the Wurie vehicle by discharging his firearm because he believed that Officer Paillant's life was in danger and he

believed that discharging his firearm was the only decision he had. And that's in defendants' 56.1 statement in Paragraph 74 and the plaintiff's response to that paragraph.

In these circumstances, a reasonable jury could not conclude that Taylor intentionally inflicted harm on Miss Barros-Cepeda in a way that shocks the conscience. Rather the undisputed facts compel the conclusion that Taylor made a split-second decision to shoot at the driver for legitimate law enforcement reasons which had the very unfortunate effect of killing a passenger.

I note that in 1990, the First Circuit reached the conclusion that there was no violation of the right to substantive due process in ***Landol-Rivera*** using a reckless indifference standard. That's at Pages 796 to 97. In 1998, the Supreme Court, in ***Lewis***, raised the standard to an intent-to-cause-harm standard. That's at Page 854.

Because I find there was no constitutional right violated, it is not necessary to rely on -- for Taylor to rely on qualified immunity. However, in view of the close analogy between ***Landol-Rivera*** and this case, if the evidence were sufficiently different to establish a Fourth Amendment or a substantive due process violation, Officer Taylor would be entitled to qualified immunity

because a reasonable police officer would not have known his conduct violated Barros-Cepeda's Federal constitutional rights.

I note that there's no consensus of cases disagreeing with the First Circuit in ***Landol-Rivera***. The Sixth Circuit's ***Fisher*** case seems to be an outlier. And I take some guidance on this issue from the First Circuit's decision in ***Jennings vs. Jones***, 499 F. 3rd at 16 to 17.

There are two remaining state law claims, Count 4, the wrongful death claim against Officer Taylor, and Count 6, the so-called survival action. As I wrote in 1996, in ***Ducas vs. Martin,*** 941 F. Supp. 1281, at 1294 to 95 and at Note 14: "While the Court has the power to retain jurisdiction over a plaintiff's pendant state tort claims, if the Federal claims are dismissed before trial, even though not insubstantial in the jurisdictional sense, the state claims should be dismissed as well." That's ***United Mine Workers vs. Gibbs***, 383 U.S. 715, at 726. ***Carnegie Mellon University vs. Cowhill***, 484 U.S. 343, at 350, is similar.

Since the plaintiffs have no surviving Federal claims, I'm exercising my discretion in dismissing the two pendant state law claims without prejudice. In doing this, I note that pursuing the claims in the

courts of the Commonwealth of Massachusetts would not now be barred by the statute of limitations. Under the Massachusetts renewal statute, M.G.L., Chapter 260, Section 32, the plaintiff can pursue her state law claims in the state court if they are filed within one year after the dismissal without prejudice from the Federal court. The Massachusetts Appeals Court affirmed that interpretation of the relevant statute in ***Liberache vs. Conway***, 31 Mass. Appeals Court 48, at 42 to 44.

So I will enter a very short order granting summary judgment on the Federal claims against Officer Taylor, granting summary judgment against the City of Boston, and dismissing, without prejudice, the pendant state law claims against Officer Taylor. That will conclude this case before this court. If either party would like a record of this decision, you should order the transcript. As I said earlier, I may or may not convert that transcript into a more formal memorandum and order.

Is there anything further in this matter for today?

MR. STOCKWELL-ALPERT: Just briefly, Judge. Dr. Lipman is the plaintiff's witness, not the defendant's witness. You mentioned it in your --

THE COURT: Okay. I'm sorry I made that

mistake.

MS. LITSAS: There's nothing else, your Honor. Thank you very much.

THE COURT: All right. As I said, this was a hard-fought case for high stakes and it's very unfortunate that Miss Cepeda -- Barros-Cepeda was killed, but, like you, I've worked hard to try to get this right, and if you feel I didn't, of course, there's a right to appeal. The Court is in recess.

(Ends, 4:45 p.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes before Chief Judge Mark L. Wolf, on Monday, September 22, 2008, to the best of my skill and ability.

/s/ Richard H. Romanow

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RICHARD H. ROMANOW